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# Application of Online Systems in Alternative Dispute Resolution

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## INTRODUCTION

It has been said that not since the invention of the printing press has there been so great an advance in the technology of communication as the Internet. In the past few years, the Internet has rapidly developed from a simple network of government, military, and research computer networks to a global medium for the exchange of ideas and information. The Internet and related technology provide to anyone with a computer and a modem the ability to converse instantaneously with others anywhere in the world; to transfer documents and information almost instantaneously across the globe; and to take action beyond conventional borders—and outside conventionally defined jurisdictions.

This article examines the extent to which the technology of the Internet can be applied in alternative dispute resolution. This article provides a history and overview of alternative dispute resolution, along with a discussion of its advantages and disadvantages. This is followed by a study of the current development of alternative dispute resolution bodies in Cyberspace and some of the technological and legal issues associated with them. The potential application of these systems in alternative dispute resolution is then examined through a comparative analysis of *Tierney and Email America*[1] and *Cyber Promotions v. America Online*.[2]

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† Consultant, *The Virtual Magistrate Project*, Oct. 16, 1997, <http://vmag.law.vill.edu/> (on file with author and the *Buffalo Law Review*). E-mail: fcona@ipwarehouse.com.

1. *Tierney and Email America*, Virtual Magistrate No. 96-0001 (1996). Tierney is a test case of online arbitration conducted by the Virtual Magistrate project, which can be found on the Internet at <http://vmag.vcilp.org/doksys/96-0001/> (on file with author and the *Buffalo Law Review*).

2. Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 456 (E.D. Pa. 1996).

## I. ALTERNATIVE DISPUTE RESOLUTION

### A. *History of Dispute Resolution*[3]

Alternative, private forms of dispute resolution are deeply rooted in the Western legal tradition. In the early English legal system, the king (and the local lord) often exercised a property-based power as a landlord as well as exercising public power based on the law. In addition to property-based power, there were a number of early examples of consensual jurisdiction more like modern arbitration. Both property-based power and consensual jurisdiction were transplanted to the new world. The proprietary charters of many of the original colonies contain provisions giving the proprietor the power to establish local courts, subjected mainly to the limitation that certain more serious cases would be referred to the royal courts in England. Also, statutes, like those enacted in Pennsylvania in 1705 and 1810, provided for arbitration of matters pending in court.[4]

With the dawn of modern international commerce, a number of international commercial dispute resolution mechanisms developed that were effectively independent of traditional sovereign-based adjudicatory powers. Both the Law Merchants, which developed from arbitration commissions of merchants organized by the courts, and the Law of Nations (International Law) evolved into uniform bodies of trade customs and practices that were independent of any one sovereign nation.

Another source of extra-judicial adjudication was the fair courts, which also helped develop this independent body of commercial law. Annual fairs, involving traders from around the world, took place in a number of places in Europe. At each fair was a dispute resolution body that heard commercial disputes among the participating merchants. Before the rise of nationalism and the demise of fair courts, the Law Merchants had already developed into a separate body of law with several distinguishing characteristics: (1) it was international, (2) its principal source was mercantile customs, (3) it was administered by the merchants themselves, (4) its procedure was quick and informal, and (5) it stressed equity as an overriding principle.[5]

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3. Henry H. Perritt, Jr., *Electronic Dispute Resolutions on NCAIR Conference*, May 22, 1996, <http://www.law.vill.edu/ncair/disres/PERRITT.HTM> (on file with author and the *Buffalo Law Review*).

4. Act of 1705, ch. 150, 1 Pa. Laws (Sm. I) 49; Act of March 20, 1810, ch. 3219, 5 Pa. Laws (Sm. I) 131 (current version at 42 PA. CONS. STAT. ANN. § 7362 (Purdon 1982)).

5. Mark Garavaglia, *In Search of the Proper Law in Trans National Commercial Disputes*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 29, 32 at n.10 (1991) (citing Berman & Kauf-

Although of lesser substantive importance today, the effect of the Law Merchants is evident in modern international arbitration, national commercial arbitration, and the Uniform Commercial Code. This ideal of a uniform body of conduct and procedure (at both a national and international level) takes on renewed importance with the emergence of the Internet.

Throughout American history in particular, there has been a number of efforts to privatize legal functions. For example, large-scale labor disputes in the early part of this century led to the initiation of collective bargaining and various labor-related dispute resolution schemes. By the 1920s, commercial interest in arbitration was so strong that it led to the establishment of the American Arbitration Association (AAA).

Today, a number of non-governmental adjudicatory organizations exist for the resolution of commercial disputes. These organizations provide a mechanism for the resolution of commercial disputes concerning a wide variety of subject matter. For example, the International Chamber of Commerce (ICC), based in Paris, France, administers a significant portion of international arbitrations, particularly cases which involve complex commercial transactions. Other similar organizations include the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Recently, the World Intellectual Property Organization (WIPO), based in Geneva, Switzerland, also established an arbitration center. This center could be of particular interest in the context of disputes arising on the Internet due to its incorporation of computer technology into its arbitral procedures. The American Arbitration Association also administers both national and international commercial disputes.

The use of alternative forms of dispute resolution to settle commercial disputes has grown tremendously in recent years. In 1991, the AAA handled over 60,000 ADR cases.[6] Between 1987 and 1992, the AAA nearly doubled its international commercial arbitration caseload, from 106 to 204 cases.[7] The ICC has handled 7,500 international arbitrations since it was founded in 1923.[8] Of this number, 3,500 have taken place in the last 10

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man, *The Law of International Commercial Transactions (Lex Merchatoria)*, 19 HARV. INT'L L.J. 221, 274-77 (1978)).

6. Betty S. Murphy, *ADR's Impact on International Commerce*, 48 DEC DISP. RESOL. J. 68, 69 (1993) (citing ARB. TIMES, (Fall 1992), at 1).

7. *Id.*

8. *Id.*

years. In fact, ADR is now the most used method of international commercial dispute resolution.

### B. *Types of Alternative Dispute Resolution*

The resolution of modern commercial disputes outside of sovereign courts can take a number of forms. These disputes are typically either "interest disputes" or "rights disputes." Interest disputes involve the adoption and articulation of new codes of conduct or procedure. Examples of this type of dispute resolution are collective bargaining, legislating, and contract drafting. Rights disputes usually involve claims that arise under existing codes or procedures. Examples of rights dispute resolution include lawsuits and contractual arbitration. Thus, interest disputes require the exercise of a rule-making function, while rights disputes require the exercise of adjudicatory power.[9] The nature of the dispute and the type of resolution used will oftentimes have a determinative effect on the ultimate enforceability of any award or agreement reached—an issue of great concern in the development of Internet-based dispute resolution.

Regardless of which ADR method is chosen to resolve a dispute, enforcement of an ADR award is sometimes very difficult, particularly in an international commercial dispute. Currently, there is no supranational machinery in place to enforce awards. There is no "World Supreme Court" which can require a citizen of one country to pay an award to a citizen of another country. A party seeking enforcement of an award must rely on national court systems. Although many nations routinely recognize and enforce arbitral awards, enforcement via national court systems can, by itself, be a costly and time-consuming endeavor.

Fortunately, however, the majority of such awards are observed by the parties without the need to resort to judicial assistance. The ICC estimates that ninety to ninety-five percent of its awards are spontaneously paid without the assistance of a national court.[10] Other ADR institutions report similar figures.

The following are the most common types of alternative dispute resolution techniques, some of which are more suitable for resolving rights disputes; others are more suitable for resolving

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9. Henry H. Perritt, Jr., *Electronic Dispute Resolutions on NCAIR Conference*, May 22, 1996, <http://www.law.vill.edu/ncair/disres/PERRITT.HTM> (on file with author and the *Buffalo Law Review*).

10. Richard J. Graving, *The International Commercial Arbitration Institutions: How Good a Job Are They Doing?*, 4 AM.U.J.INT'L L.& POL'Y 319, 333 (1989).

interest disputes:[11]

1. *Arbitration.* Arbitration is private adjudication in which a non-governmental neutral party hears presentations by the disputants and makes a decision that is legally binding on them. Traditionally, arbitrators have drawn their power from contracts. However, court-annexed arbitration is growing in popularity. In such cases an arbitrator draws power from a court order or rule. Arbitration agreements may declare in advance a willingness to arbitrate a class of disputes that may arise in the future (an agreement *ex ante*). They may also be entered into after a particular dispute has arisen and apply only to that dispute (an agreement *ex post*).

2. *Negotiation.* Negotiation is the most common form of dispute resolution. Most disputes are resolved by negotiation without ever appearing in the public records of court systems; even those disputes that do make it to the court dockets are most often resolved this way. Negotiation is typically a two-party process. The disputants themselves communicate with each other to find common ground and to persuade the other of the advantage of consensual settlement rather than resort to other legal or coercive processes.

3. *Mediation.* Mediation is similar to negotiation except that a third party, the mediator, is employed to aid the disputants in seeking common ground. A mediator, unlike an arbitrator, does not have the power to decide a dispute, but only to assist the disputing parties in negotiating a resolution. Mediators facilitate communication between disputants, help them discover mutual interests, and help shape perceptions of the costs of failing to settle as an inducement to settle.

4. *Med-Arb.* Some arbitration processes include mediation as an initial step. When judges seek to promote settlement, they act in a mediation function. When arbitrators do the same the process is sometimes referred to as med-arb.

5. *Fact-Finding.* Fact-finding is similar to arbitration except that the decision is not binding or is limited to determinations of factual issues. Some mediation processes, especially in

11. These descriptions are taken from Henry H. Perritt, Jr., *Electronic Dispute Resolutions on NCAIR Conference*, May 22, 1996, <http://www.law.vill.edu/ncair/disres/PERRITT.HTM> (on file with author and the *Buffalo Law Review*).

publicly sensitive labor disputes, are followed by a fact-finding process.

6. *Ombuds.* The ombudsperson is not an authoritative or final decision maker but is "a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver."[12] Some public agencies and corporations in the United States appoint an ombudsperson to serve as a kind of high level complaint desk, with the power to receive disputes and complaints, an informal power to investigate, and the power to persuade or induce changes in position through public embarrassment.

C. *Modern Legal Framework*

The resolution of disputes through ADR involves a complex framework of laws and legal regulations that allows for the efficient determination and enforcement of arbitral decisions. This framework consists primarily of four distinct layers of regulation:[13]

1. *Contract Law.* For a sovereign court or other public adjudicatory institution to resolve a dispute in a binding manner, it must have both subject matter jurisdiction over the dispute and personal jurisdiction over the disputant. Subject matter jurisdiction means that the decisionmaker has been assigned responsibility for that class of dispute. Personal jurisdiction means that the parties to be bound by the decision have some contact with the government agency giving power to the tribunal and that they have sufficient notice of the proceeding sufficient to allow them to participate.

In addition, public tribunals have the power to resolve disputes only when they follow relatively formal procedures prescribed for them by the sources of their power, usually codified in rules of procedure and evidence. When subject matter and personal jurisdiction and procedural compliance exist, decisions of a public adjudicatory institution are entitled to be enforced not only by the sovereign that created the tribunal, but also by other sovereigns. For example, the obligation to enforce such

12. Mary P. Rowe, *Options, Functions, and Skills: What an Organizational Ombudsman Might Want to Know*, 11 NEGOTIATION J. 103 (1995).

13. Jack Goldsmith & Lawrence Lessig, *Grounding the Virtual Magistrate*, Oct. 16, 1997, <http://www.law.vill.edu/ncair/disres/groundvm.htm> (on file with author and the *Buffalo Law Review*).

judgments arises under at least the Full Faith and Credit Clause of the United States Constitution when involving courts in the United States, and under the doctrine of comity in international situations.

For private dispute resolution systems, however, the legal framework is more varied. Ombudsperson recommendations, mediation processes, and fact-finding decisions do not have binding legal effect, and therefore no legal framework is necessary for them except perhaps to provide for the establishment and financing of the processes. With arbitration, however, the power of arbitrators and the effect of arbitration awards are matters of contract. Virtually every aspect of arbitration is definable in an arbitration agreement. An arbitration agreement can provide for one or multiple arbitrators, can identify the arbitrator by name or define a pool from which arbitrators are to be selected, provide for rules of evidence, allow or preclude discovery, define the nature of pleading or eliminate written presentations altogether, and set time limits for party presentations and arbitral decisions.[14]

2. *Procedural Arbitration Rules.* The second layer of legal regulation includes procedural arbitration rules. These rules are adopted by the consent of the parties, and are usually specified in the arbitration agreement. These rules govern all aspects of arbitral procedure, such as the appointment and challenge of arbitrators, pleadings, discovery, hearings, and the form of the final award. Arbitral rules come in a variety of prepackaged forms and add a certain amount of authority to the arbitration process.[15]

3. *National Arbitration Law.* The national arbitration law of each of the sovereign nations is the next mechanism for insuring the enforceability of arbitral awards. Such laws provide for national enforcement of private dispute resolution agreements. National arbitration laws define the scope of permissible arbitration within the country, render arbitration agreements within this scope valid, and provide various forms of judicial assistance for and judicial review of arbitral adjudication. For ex-

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14. Henry H. Perritt, Jr., *Electronic Dispute Resolution an NCAIR Conference*, May 22, 1996, <http://www.law.vill.edu/ncair/disres/PERRITT.HTM> (on file with author and the *Buffalo Law Review*).

15. *See, e.g.*, American Arbitration Association, *Commercial Arbitration Rules*, July 1, 1996, <http://www.adr.org/comrules.html> (on file with author and the *Buffalo Law Review*).

ample, in the United States, this law is the Federal Arbitration Act, which provides that federal courts are given jurisdiction and are obligated to enforce arbitration agreements affecting interstate commerce.[16] Similar acts, as adopted in virtually every state, provide a similar mandate to state courts. Under these statutes, courts may refuse to enforce arbitration awards only if the award is tainted by fraud or gross irregularity of procedure or if the arbitrator acted without power conferred by the arbitration agreement.

In addition to the expedited enforcement procedures under these arbitration statutes, parties seeking to enforce an arbitration award also can file a common law breach of contract action, since typically a contract to arbitrate is also a contract to obey the arbitration award.

4. *International Enforcement Treaties.* There are two primary international conventions that can assist parties in enforcing ADR awards. The most important of these is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[17] By signing the New York Convention, countries agree to recognize and enforce arbitral awards rendered in the territory of other signatories.

However, the New York Convention contains two important defenses.[18] The first is that the grounds of a dispute are not arbitrable under the domestic law of the state where enforcement is sought. In such a case, a court may refuse to enforce an international award. The second defense is the more general defense of public policy. Under the New York Convention, a domestic court is permitted to refuse enforcement of an arbitral award where enforcement would violate the public policy of the forum.[19] However, the Convention does not provide guidance as to when this defense can be invoked, so national courts may have widely varying notions of when and how to invoke their public policy.

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) is the second major international ADR enforcement convention.[20] However, the ICSID Convention only applies to

16. 9 U.S.C. § 1 (1988).

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

18. *Id.* at art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40-2.

19. *Id.*

20. Convention on the Settlement of Investment Disputes Between States and Na-

awards rendered by ICSID, whose jurisdiction is limited to disputes between states and foreign investors. Awards rendered pursuant to the ICSID Convention are automatically binding on the parties and are subject to appeal only within the structure provided by the ICSID Convention.

More importantly, an award must be recognized and enforced by any ICSID Convention contracting state as if the award were a final judgment of that state's highest court. This avoids the necessity of domestic court proceedings to enforce the judgment. Under both Conventions, a losing party retains certain defenses to enforcement of an award. These defenses are limited and generally have been interpreted strictly by national courts.

Under the ICSID Convention, two major defenses to enforcement exist: the doctrine of sovereign immunity and the act of state doctrine.[21] Sovereign immunity embodies the idea that sovereign states cannot be subjected to the jurisdiction of a foreign court without their permission. In the context of ADR, its major effect is to make enforcement of an award against a sovereign impossible. In its traditional form, a sovereign is immune from any assertion of jurisdiction by a national court.

However, many nations have rejected the traditional concept of absolute immunity in favor of restrictive immunity, which distinguishes between governmental acts, which are immune, and commercial acts by governments, which are not immune from a foreign court's jurisdiction. Since commercial acts of governments are subject to a foreign court's jurisdiction, the foreign court can, in theory, uphold ADR awards against a foreign sovereign. The concept of restrictive immunity is embodied, for example, in England's State Immunity Act of 1978 and the U.S. Foreign Sovereign Immunity Act.[22]

The act of state doctrine prohibits foreign courts from examining the validity of the acts of sovereign nations. Although the ICSID Convention purports to permit foreign courts to enforce ADR awards against sovereign states, these two defenses do provide exceptions for some government acts. The courts of one country still cannot force a foreign government to pay an ADR award. Private parties and companies, therefore, must continue to rely on the goodwill of national governments in paying adverse ADR awards.

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tionals of Other States, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

21. *Id.* at art. 55.

22. 28 U.S.C. § 1 (1994).

D. *Traditional Advantages of Alternative Dispute Resolution*

Conventional ADR has significant advantages to court-based litigation. A review of these "pros and cons" is necessary to understand how the Internet can play a role in the dispute resolution process. Some of the advantages of ADR are:

1. *Avoids High Cost of Litigation.* In general, arbitration, and other forms of dispute resolution provide a significant reduction in the cost of litigating a dispute over court-based systems. One possible exception to this is in complex commercial transactions which necessitate the review of large numbers of documents and the testimony of expensive experts. For example, complex transactions can often arise in intellectual property disputes, particularly when patent infringement is involved.

However, even in these situations, ADR can provide significant savings. For example, in 1995, the American Intellectual Property Law Association reported that the average total cost of a patent infringement suit through trial in the United States was between about $500 thousand and $1.9 million. In sharp contrast, the total cost through binding arbitration of a patent infringement claim was between about $99 thousand and $500 thousand.[23]

2. *Resolves Disputes More Quickly.* Disputes settled through arbitration are typically resolved much faster than with traditional litigation (typically several months as opposed to several years). However, complex cases that are arbitrated may take just as long to resolve as court-based suits.

3. *Confidentiality of Dispute Resolution.* Unlike court-based adjudicatory systems which typically are required to make case documents and information available to the public, ADR has the advantage of making confidentiality of the proceedings a condition to agreeing to arbitration.

4. *Less Confrontational.* Alternatives to litigation, particularly mediation and negotiation, are typically less confrontational than a court trial. Mediation and negotiations typically take place in a more informal setting, such as a conference room or office, and involve the use of an intermediary rather than an adjudicator. Even arbitration, which typically takes place in a

23. Committee on Economics of Legal Practice, AM. INTELLECTUAL PROPERTY LAW ASS'N, Report of Economic Survey 1995, 61-64.

hearing room or conference room before one or more arbitrators, often does not involve the formal procedures and evidentiary rules mandated in courtroom settings.

5. *Specialized Expertise.* While some courts and judges have specialized functions (for example, bankruptcy courts and the orphans courts), most judges are assigned cases on a more general basis. While judges are often well versed in the law of a particular commercial area, they usually lack the specialized expertise of those experienced in the field. When arbitrating or mediating a dispute, however, the disputants have the ability to choose arbitrators with expertise in the area of their dispute, in the hope of obtaining a more equitable solution than a court might otherwise provide.

6. *Provides Neutral Forum.* Anyone familiar with litigation is aware of the strategic importance of forum shopping in choosing the best court within which to bring an action. Conversely, the location of a suit can be a significant disadvantage to the other party. This may be particularly true in an international setting. Arbitration allows parties to select a neutral forum in which to resolve their dispute. Most arbitration procedures allow for the selection of a forum upon agreement of the parties.

7. *More Flexibility for Resolution of Disputes.* Oftentimes, courts limit the options available to the disputants. This is not the case with alternative dispute mechanisms, which can more freely establish the boundaries of acceptable remedies.

8. *Foreign Arbitral Awards Are Often Easier to Enforce.* While issues of comity and international law often make the enforceability of legal judgments less clear, most nations, including the United States, are signatories to international conventions. One such convention is the New York Convention, which provides, that foreign arbitral awards must be enforced.

E. *Traditional Disadvantages of Alternative Dispute Resolution*

1. *Consent of All Parties Required.* Unlike conventional litigation, in which the power of the court can be used to compel a party to resolve a dispute (even if by default), alternative forms of dispute resolution are voluntary and must be agreed to by all parties in order to be binding. Such an agreement can occur *ex ante*, such as by a contractual provision entered into before the

substance of the dispute arose, or *ex post*, such as when the parties agree to arbitrate after a dispute has arisen.

2. *ADR is Not Always Appropriate.* Arbitration and alternative forms of dispute resolution are most beneficial when the motivating force driving the parties is economic. That is, when the issue to be resolved involves the calculation of damages to one party or the other. However, in situations where one of the parties seeks a vindication of legal rights, ADR is much less effective.

3. *ADR is Not Necessarily Consistent.* Unlike court-based adjudication, arbitration is conducted without the influence of precedent opinions and mandated legal rules. Thus, each dispute is decided based solely upon the facts of that particular dispute. Disputants are not required to look to previous arbitrations when planning and presenting their cases.

## II. USING THE INTERNET TO RESOLVE INTERNATIONAL DISPUTES

### A. *Development of Alternative Dispute Resolution on the Internet*

With the advent of the Internet as a global means of communication and the inevitable conflicts arising therefrom, a number of "real-world" dispute resolution organizations have made themselves known on the Internet. This has resulted in the rapid evolution of online dispute resolution systems and the presence of arbitrating authorities in Cyberspace. For example, the ICC's web site allows users to find out about the ICC, its procedures, and how to contact them.[24] The American Arbitration Association also has a web site which contains information about the AAA, its practices, and an HTML-formatted version of the AAA rules and codes.[25]

In addition to the establishment of conventional arbitral organizations in Cyberspace, several new organizations and pilot projects have also emerged whose functionality is itself intertwined with the technology of the Internet. These organizations are attempting to develop new ways of resolving both conventional "real-world" disputes, and disputes arising in Cyberspace.

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24. *International Chamber of Commerce Home Page*, Oct. 16, 1997, <http://www.iccwbo.org/> (spot: ICC) (on file with author and the *Buffalo Law Review*).

25. *American Arbitration Association Home Page*, Oct. 16, 1997, <http://www.adr.org/> (spot: American Arbitration) (on file with author and the *Buffalo Law Review*).

One example of these new organizations is the Virtual Law Firm, which comprises a network of arbitrators having highly specialized backgrounds in specific, conventional practice areas who can be reached via the Internet to resolve disputes.[26] This system operates along the lines of an enhanced referral service.

Other projects, however, are developing ways to resolve disputes directly online. Three of these projects, sponsored in large part by the National Center for Automated Information Research (NCAIR), are the Virtual Magistrate, the Online Ombuds Office, and the Online Mediation Project.

The Virtual Magistrate Project is an experimental project that offers arbitration for rapid, interim resolution of disputes involving (1) users of online systems, (2) those who claim to be harmed by wrongful messages, postings, and files and (3) system operators.[27] Arbitration services will be available for computer networks anywhere in the world as long as relevant parties agree to participate.

Policy for the Virtual Magistrate is directed by the Cyberspace Law Institute.[28] Cases submitted to the Virtual Magistrate are administered by the AAA. The AAA maintains a pool of magistrates who are highly trained in the issues surrounding the law and online systems. The Virtual Magistrate is operated by the Villanova Center for Information Law and Policy.[29] The stated goals of the Virtual Magistrate Project are to:[30]

> (1) Establish the feasibility of using online dispute resolution for disputes that originate online.
> (2) Provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings.
> (3) Provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about online messages, postings, and files.
> (4) Lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings).
> (5) Help to define the reasonable duties of a system operator confronted with a complaint.

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26. *The Virtual Law Firm*, Oct. 16, 1997, <http://www.dnai.com/tulf/index.html> (spot: virtual law firm) (on file with author and the *Buffalo Law Review*).

27. *The Virtual Magistrate*, Oct. 16, 1997, <http://vmag.vcilp.org/> (spot: virtual magistrate) (on file with author and the *Buffalo Law Review*).

28. *Cyberspace Law Institute*, Oct. 16, 1997, <http://www.cli.org/> (spot: Cyberspace Law Institute) (on file with author and the *Buffalo Law Review*).

29. *The Virtual Magistrate Concept Paper*, July 24, 1996, <http://vmag.vcilp.org/docs/vmpaper.html> (spot: virtual magistrate concept) (on file with author and the *Buffalo Law Review*).

30. *Id.*

(6) Explore the possibility of using the Virtual Magistrate Project to resolve other disputes related to computer networks.

(7) Develop a formal governing structure for an ongoing Virtual Magistrate operation.

The subject matter jurisdiction of the Virtual Magistrate was specifically limited to certain defined areas. The Virtual Magistrate Project accepts complaints about messages, postings, or files allegedly involving copyright or trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate (obscene, lewd, or otherwise violative) materials, invasion of privacy, and other wrongful content.[31]

The Virtual Magistrate will also decide whether it would be reasonable for a system operator to delete or otherwise restrict access to a challenged file or posting. Other cases may call for decisions about the disclosure of the identity of an individual to a person other than the government. In extreme cases, the Virtual Magistrate may rule on whether it is appropriate for a system operator to deny a person access to an online system.[32]

The Online Ombuds Office (OOO) is another project whose goal is to develop Internet-based dispute resolution. The OOO is also funded by NCAIR and is operated by the University of Massachusetts. The OOO project is primarily interested in disputes arising out of online activity.[33] The OOO provides users with two types of assistance. Users can help themselves by browsing through the OOO site to retrieve information that is helpful in dealing with their disputes. Users can also ask for the assistance of one of the online ombudspersons. These persons have considerable experience in dispute resolution and will communicate with users about what strategies might be appropriate.

The OOO operates as follows. A user provides the OOO with information about her dispute. An ombudsperson is assigned to the case and usually contacts the user via e-mail. The ombudsperson may ask questions about what has happened or about what the user wants. The ombudsperson may also have questions about the other party. If both parties are cooperating in using the Online Ombuds Office, then the ombudsperson will

31. *Id.*

32. *Id.*

33. *The Online Ombuds Office*, Sept. 10, 1997, <http://www.ombuds.org/> (on file with author and the *Buffalo Law Review*).

mediate the dispute. If one party refuses to cooperate, she will suggest some other strategy.

The OOO also has the Online Ombuds Conference Room where, using technology like Internet Relay Chat (IRC) and chat rooms,[34] the ombudspersons can have real-time discussions with the parties. The ombudsperson can meet with all the parties in one of these chat rooms or can put each party in a different room and shuttle back and forth. The OOO intends to also experiment with the use of video-conferencing.[35]

The third NCAIR sponsored project is much more narrowly focused in its subject matter. The Online Mediation Project is based at the Center for Law Practice Technology at the University of Maryland School of Law and is a pilot project for determining the feasibility of resolving family domestic and health care disputes over the Internet or through online systems. Cases mediated by the Online Mediation Project are limited to family domestic and health care disputes arising in Maryland, although the techniques and technology developed by the project may have much broader application.

The Online Mediation Project is currently creating a site which will act as a gateway to its mediation service. It advertises the availability of the service on the World Wide Web; collects contact information from prospects in order to assess the suitability for participation in the project; and contains mediation rules, a copy of the agreement to mediate, information about the backgrounds of the mediators, and a copy of the mediation handbook.

The project intends to develop a web site for each category of dispute that contains substantive legal information. Work is currently underway to create a Maryland Family Law Information Center, which is supported by a separate grant to the Law School. This web site will contain general discussions of Maryland family law, supported by visual enhancements and graphics; sample forms and instructions for *pro se* litigants; and tools, such as a child support calculator and judicial standards for alimony and spousal support awards. Flow charts and graphics will be used to explain complex legal concepts. The generalized

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34. Internet Relay Chat (IRC) is an Internet-based communication system through which users can converse with each other in real time by typing messages on their keyboards. These messages are then transmitted to the "chat room" which is a computer server, or portion thereof, capable of re-transmitting these messages to the computer screens of all the other users currently logged into that particular chat room.

35. *The Online Ombuds Office*, Sept. 10, 1997, <http://www.ombuds.org/> (on file with author and the *Buffalo Law Review*).

discussion will also be annotated with case and statutory references, and there will be links to other sites that provide information on a variety of family law issues. Easy access to cases and other legal materials can be used by the parties to support arguments and clarify their negotiating positions. A similar web site will be created to support health-related mediations.

The legal web sites will also be supported by a staff person with expertise in the underlying substantive law. This person will guide the parties to relevant legal materials in the web site but will refrain from providing actual legal advice. Another staff person will also provide technical assistance, either by telephone or by e-mail, to help the parties and the mediator utilize the software programs and master any technical barriers that might detract from the mediation itself.

The project will also use multi-threaded discussion group software as a mechanism for structuring lines of arguments between the parties and providing the primary vehicle for the mediator to facilitate discussion and negotiation between the e-mail parties. E-mail will be used by the mediator to communicate with each of the parties and will enable the parties to consult with the mediator as they shape their negotiating positions. All filings of exhibits and documents will also be conducted by e-mail.[36]

B. *Use of Online Systems in Alternative Dispute Resolution*

1. *Technical Issues.* The potential use of the Internet to resolve international disputes can be divided into two distinct areas: using Internet-related technology to resolve "real world" disputes online or partially online, and using the Internet to resolve disputes arising in Cyberspace itself. Online systems provide several technological advantages that can significantly aid in the resolution of commercial disputes. However, this technology also raises many issues related to the choice of law in rendering a decision and how to ensure enforcement of that decision.

Information technologies such as the Internet have four significant effects on communication and information management in dispute resolution. They make it possible for anyone to transmit significant quantities of information to anyone else over virtually any distance instantaneously. They make it possible for

36. Richard S. Granat, *Creating An Environment for Mediating Disputes On the Internet: A Working Paper for the NCAIR Conference on Online Dispute Resolution*, Washington, DC, May 22, 1996.

disputants to communicate interactively without being present in the same place. They make it possible for participants to communicate asynchronously, that is, without being connected to the system at the same time. They facilitate the storage, retrieval, review, and reuse of existing information.[37]

The first and last of these effects offer significant advantages when information technology is applied to processes that involve significant amounts of paper, such as in the arbitration of a complex international intellectual property dispute. This is why information technology is now widely being implemented by traditional courts to manage documents and docketing of their cases, as well as by attorneys and litigants in handling large amounts of discovery documents.

The second and third effects noted above involve the automation of hearings and conferences. Electronic mail can be used to replace a certain amount of face to face oral interaction and to replace or supplement telephone contact, which itself is a substitute for face to face or written interaction. Additionally, the World Wide Web has added to the flexibility of electronic conferencing and document presentation—a particularly significant advantage when large amounts of preexisting information need to be organized and examined.

This technology is currently limited primarily to text and static images. This means that an electronic hearing or conference is like substituting written communication for oral and nonverbal communication, but with the advantage that the communication is interactive and almost instantaneous. Conversely, electronic conferencing can be accomplished asynchronously, without the need for all parties to be available at the same time. Thus the use of this technology even as it exists today has the potential to significantly reduce paper transferal costs and some of the expenses incurred in participating in person.

Technologies like the World Wide Web make it easy for potential participants to find the starting point for service with the simple click of a button. It is easier for a disputant to submit a dispute. She need not go to the office of the AAA or a lawyer, but only to fill out a web form or send an e-mail message. Delays associated with waiting for forms are avoided. Additionally, dockets can be visible to participants, changes to them would be immediately available, and the full contents of all materials could be directly available from the docket itself. No

37. Henry H. Perritt, Jr., *Electronic Dispute Resolutions on NCAIR Conference*, May 22,1996, <http://www.law.vill.edu/ncair/disres/PERRITT.HTM> (on file with author and the *Buffalo Law Review*).

telephonic or written face to face request would be necessary for documents.

An archival record of arbitration awards and of the filings can be made easily available to public participants in other cases without the need for any investment of additional labor or capital. Conversely, records for a specific case can be electronically sealed, simply retaining the requirement for the user authentication step.[38]

There are no travel expenses or conference room rental expenses for arbitrator or participants. Time required to participate would be less for the filing docket-checking and hearing stages, although not for document preparation and review. Moreover, the use of video conferencing and the exchange of video files would greatly expand the power of electronic hearings and conferences, permitting oral and nonverbal messages to be sent and received both synchronously and asynchronously around the world.

But there are also limitations. While information technology can be used to reduce the time and cost involved in some of the traditional mechanisms of international arbitration, it cannot truly replace oral discussion and a face-to-face examination of witnesses. In many disputes, the necessary frequency of such in-person events may make the implementation of Internet-enhanced dispute resolution impracticable. In a large number of cases, however, this technology can be used to some extent to significantly reduce costs.

2. *Legal Issues*. Outside of the technical considerations involved in handling disputes online, there are some legal concerns. Any form of arbitration, whether online or in the "real world" must be agreed to by all parties involved in order to be binding. As noted above, this contractual aspect of ADR is the first level in a complex system of enforcement mechanisms. The enforceability of Internet-based adjudication is currently significantly hampered by the fact that this type of dispute resolution is not yet formally recognized at the other levels of enforcement. Thus, in addition to the fact that agreement of the parties is fundamental in any arbitration, the need for such a commitment

38. This can be accomplished by establishing security protocols for retrieving this information, such as archiving the records on a password protected system. Thus, only by entering the proper password when logging in can users gain access to this sensitive information. Additionally, encryption coding systems can be used to secure the transmission of sensitive information across an open system, such as the Internet. The information could then only be decoded by using the proper code key.

takes on heightened importance in regard to Internet-based ADR.

While there must also be higher level enforcement mechanisms that make the consent to Internet-based ADR valid and enforceable, these mechanisms will ultimately work only if there is an initial agreement which is itself enforceable under governing law. An agreement is ineffectual unless a court will recognize the agreement as valid. Thus, to ensure enforcement of the agreement, there must be a national court that is willing to treat the agreement as valid under the governing law, to specifically enforce the agreement, and to enjoin any litigation in violation of the agreement. Moreover, it is not enough that a single national court be available to enforce these agreements. There must be coordinated enforcement among other national courts.

However, Internet-based resolution of Internet-based disputes has an additional feature not found in conventional arbitration. Disputes that arise in Cyberspace involve computer users who must enter the online world through a physical access point. This creates an additional method of enforcement of disputes occurring in Cyberspace: disconnection. Conditioning a user's access to Cyberspace upon compliance with the decision of a properly recognized adjudicatory body can aid in the enforcement of arbitral awards by effectively enjoining (to some extent) the user's ability to interact in the online world.[39] This itself, however, may raise concerns regarding due process and related rights.

National courts must also recognize and enforce the arbitrators ruling. Recognition allows the ruling to operate as a bar in subsequent national court litigation. Enforcement allows for the execution of the ruling as a valid judgment against, for example, the assets of a recalcitrant party. In this vein, national arbitration laws need to be modified to include dispute resolution in Cyberspace. Similarly, international treaties would need to be modified to apply to Internet-based ADR. Particularly, writing requirements and geographical requirements would need to be modified in a manner similar to national laws.[40]

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39. An example of such a contractual obligation would be the inclusion of an online arbitration clause in a service provider's subscriber agreement or user policy. Each service provider's system would then become in effect its own cyber jurisdiction, giving the online dispute-resolver at least minimal jurisdiction over the parties.

40. Because electronic documents are potentially easier to corrupt without detection than paper documents, their legal effect is significantly diminished without some additional means of verifying their authenticity and integrity. Accordingly, there are currently a number of efforts being made at both the state and national level to develop legislation to enhance the enforceability of documents employing digital signatures and

Another dilemma facing online arbitrators is the difficulty in choosing the appropriate law to apply to a dispute. One possible solution is that the arbitrators could simply apply existing national choice of law rules to determine the law that governs the merits of a dispute. This is exceedingly difficult, however, because it is often unclear which choice of law rules would govern any particular dispute, and because modern choice of law systems are not clearly determinable in the "real world," much less as applied in Cyberspace. A related option would be a uniform choice of law system based on the choice of law rules from existing sovereignties. However, this option suffers from the same difficulties in application as the former.

Another approach is to establish a uniform body law so that certain types of disputes in Cyberspace are governed by the same law. Uniform law systems have already proved to be a useful solution to choice of law problems in similar transnational contexts, e.g. the development of the Law Merchant and the Law of Nations. Other more modern examples would, of course, be the UCC and the Convention on the International Sale of Goods (CISG).

This provides a number of useful options. First, nations of the world might enter into a treaty, like CISG, in which they agree that certain disputes in Cyberspace would be governed by the uniform international law embodied in the treaty. This option, however, has the drawback that it only addresses a subset of all contract law.

A fourth option is to develop a private legal regime. This can be done in one of two ways. The Cyberspace sovereignty could develop a uniform law that would govern all contractual disputes in Cyberspace. The parties would consent to this law just as they consent to Internet-based arbitration. This uniform Cyberspace law could be either mandatory law or default law. If the uniform Cyberspace law is merely default law, the parties might instead choose to design their own legal regime. They could do so either by opting out of certain default Cyberspace rules, or by choosing a particular national law to govern their contract. Each of these private legal options has its own strengths and weaknesses.

Sovereignties do not generally permit parties to have plenary control over their contractual relations. Instead, certain mandatory "public policy" laws apply regardless of party intent or consent. For example, the United States will not permit par-

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other coding schemes designed to provide the necessary verification.

ties within its jurisdiction to enter into contracts in violation of the Sherman Act. Such contracts are simply not enforceable.[41] As a general matter, the New York Convention permits an exception to the obligation to enforce arbitration agreements and awards when the arbitration involves a non-arbitrable subject or when enforcement of the award would violate a strong public policy.[42]

However, these and many other related problems already arise in "real world" and Internet-related disputes. Thus, it is possible that these types of problems could be overcome when adapting the arbitration of commercial disputes to resolution in Cyberspace.

## III. CASE IN POINT: THE BULK E-MAIL DEBATE

### A. *Tierney and Email America*

The Virtual Magistrate currently has one reported decision, *Tierney and Email America*, which was initiated as a test case for the Virtual Magistrate. In that case, Tierney, an America Online subscriber, filed a complaint with the Virtual Magistrate requesting the removal of a posting made to America Online's system by Email America. The posting included an advertisement for the sale of an extensive listing of the names of subscribers and their e-mail addresses, and indicated that users could expect an exceptionally high rate of return on bulk e-mailing[43] Internet users with product endorsements.

Tierney's request for removal of the posting was based on the grounds that (1) the advertisement promotes bulk e-mailing, which is a practice that is against sound public policy and is not in the interest of Internet users, (2) bulk e-mailing is a violation of America Online's long-standing rules prohibiting such practices, (3) the advertisement is a potential invasion of privacy and would damper use of the Internet, and (4) the advertisement was deceptive and was, in effect, false advertising.[44]

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41. Jack Goldsmith & Lawrence Lessig, *Grounding the Virtual Magistrate*, Sept. 10, 1997, <http://www.law.vill.edu/ncair/disres/groundvm.htm> (on file with author and the *Buffalo Law Review*).

42. *See* New York Convention, *supra* note 17, at art. II(1), V(2).

43. Bulk or "Junk" e-mailing refers to the large scale flooding of subscriber e-mail accounts with advertisements.

44. Particularly, Tierney took the position that a return of 18% was not feasible with such mailings, and that it was not possible to have a list of more than thirty million Internet user e-mail addresses since recent reports indicate that the total number of Internet users is currently only about twenty million.

Tierney posted his request with the Virtual Magistrate on May 8, 1996. The case was routed over the Internet to the AAA and a magistrate was selected. Since America Online was named in the request, they were also notified, via e-mail and telephone, of the dispute. On May 10, 1996, America Online submitted a posting requesting an adjournment until May 15, 1996 in order to file a brief in response to the complaint filed by Tierney. The basis of this request was that a necessary party to the action would not be available until that time, and that America Online wished to actively participate in the case.

The magistrate in the case responded with a posting agreeing with America Online's request on the basis that he was not satisfied that Email America had not yet had actual notice of the matter, and asking if Tierney had any objection to the suspension.[45] Thereafter, on May 15, 1996, America Online submitted a posting containing a detailed response in support of Tierney's complaint. This response contained the text of an affidavit describing the advantages of the Internet and its functionality, the finite computing resources of America Online's e-mail servers, the restriction in America Online's terms of service against bulk e-mailing, and Email America's actions in this regard.[46] The affidavit also indicated that America Online had received numerous complaints concerning Email America's bulk e-mail practices.

On May 21, 1996, the magistrate posted his decision that America Online should remove the posting complained of by Tierney in his dispute request.[47] In his decision, the magistrate looked to America Online's terms of service in which they reserved the right to remove content which, in their discretion, they deem harmful, offensive, or in violation of the terms of ser-

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45. *In Reply to: Virtual Magistrate Case No. 96-0001, Virtual Magistrate*, May 10, 1996, <http://vmag.vcilp.org/doksys/index.html?2> (on file with author and the *Buffalo Law Review*). As noted in the magistrate's decision, the Virtual Magistrate made three phone attempts to reach Email America over a seven day period, all of which produced no response. *See, Tierney and Email America, Virtual Magistrate*, May 21, 1996, <http://vmag.vcilp/doksys/96-0001/index.html?6> (on file with author and the *Buffalo Law Review*).

46. Email America had apparently made the posting through an America Online account. America Online's affidavit indicated that there had been several complaints lodged by subscribers regarding Email America's practices and that when America Online would close one Email America account, Email America would open another account to continue its practices. *See, Response & Affidavit of America Online, Virtual Magistrate*, May 15, 1996, <http://vmag.vcilp/doksys/96-0001/index.html?3> (on file with author and the *Buffalo Law Review*).

47. *Tierney and Email America, Virtual Magistrate*, May 8, 1996, <http://vmag.vclip.org/doksys/96-0001> (on file with author and the *Buffalo Law Review*).

vice, and which also provided that members may not post or transmit any unsolicited advertising, except in designated areas.[48] While acknowledging that direct marketing is normally a legitimate, lawful business, the magistrate pointed out that America Online does not hold itself out as a public forum or a common carrier and thus is not held to that standard.[49]

B. *Cyber Promotions v. America Online*

Cyber Promotions is a marketing company that sends bulk e-mail advertisements to target e-mail addresses across the Internet. A large number of these addresses belong to America Online subscribers. After receiving a sizable number of complaints from its users concerning Cyber Promotions and several other bulk e-mailing companies, America Online contacted Cyber Promotions in regard to their practices. When negotiation apparently broke down in early September, 1996, America Online began blocking all e-mail sent from Cyber Promotion's server to America Online's subscribers.

In response, Cyber Promotions filed for a temporary restraining order in federal court to prevent America Online from blocking the messages. In doing so, Cyber Promotions claimed that America Online's actions violated Cyber Promotions First Amendment right to free speech. The restraining order was granted on September 6, 1996, to preserve the status quo until November, when the court would hear the merits of the case.

On November 4, 1996, the court issued an order denying Cyber Promotions an injunction against America Online in regard to the mailings. In its opinion, the court held that Cyber Promotions did not have a right under the First Amendment of the United States Constitution or under the Constitutions of Pennsylvania and Virginia to send unsolicited e-mail advertisements over the Internet to subscribers of American Online. Thereafter, Cyber Promotions filed a petition for reconsideration of the decision, in which it proffered factual evidence in addition to the stipulated facts considered in the courts first decision.

After a detailed review of the stipulated facts, and those proffered by Cyber Promotions in its petition, the court reaffirmed it decision. In reaching its decision, the court looked to *ACLU v. Reno* [50] for that decision's in-depth discussion of the In-

48. *Id.* at ¶ 12.

49. *Id.* at ¶ 13.

50. American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996); *aff'd*, 117 S.Ct. 2329 (1997).

ternet itself and the extent to which First Amendment rights exist in Cyberspace. The court also looked to more traditional First Amendment decisions in order to consider the analogy which Cyber Promotions drew to semi-public areas, such as shopping malls.[51]

C. *Analysis*

A comparison of *Tierney* and *Cyber Promotions* provides some insight into the strengths and weaknesses of Internet-based ADR, as well as its potential for application in resolving both "real world" and online disputes. Both cases involve an issue of concern for Internet users: the potential misuse of e-mail services. Although the events giving rise to the disputes in both cases occurred online, the disputes involved fundamental legal issues concerning the First Amendment, privacy rights, and false advertising. Thus the facts of these cases provide a perfect backdrop against which to review the potential applications of online dispute resolution.

In *Tierney*, America Online voluntarily submitted itself to the jurisdiction of the Virtual Magistrate, agreeing to be bound by its decision. Email America, however, presumably never received service of the action against it, or, simply refused to submit itself to the Virtual Magistrates jurisdiction. Email America was only bound to the Virtual Magistrate decision indirectly, if at all, through its subscriber agreement with America Online. Thus the Virtual Magistrate was significantly limited in its remedial powers against Email America. By contrast, *in Cyber Promotions*, America Online was subject to the jurisdiction of the federal courts.

This exemplifies the lack of enforcement power inherent in online dispute resolution systems. Since contractual obligations are the only effective means of binding parties to the online tribunal, for such systems to be effective the incorporation of online arbitration clauses must be widespread (such as through their inclusion into user's subscription agreements). By binding users in this way, effective cyber jurisdictions would be developed. Without such an enforcement infrastructure, the use of online systems for binding dispute resolution has much more limited applicability.

However, these cases also illustrate that online dispute systems can be very effective as a fact-finding tribunal. By using

51. *See,* Cyber Promotion, Inc. v. America Online, Inc., 948 F. Supp. 436, 443 (E.D. Pa. 1996) (discussing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

online systems to resolve disputes occurring online or involving such technology, a well-documented and well-reasoned body of opinions can be developed to aid public adjudicators in hearing cases involving similar issues. The online magistrates have specialized expertise in these subject areas, as do the online adjudicants. Their familiarity with online issues would allow the parties and the magistrate to study an online issue more quickly and efficiently than traditional tribunals, and would yield an informative opinion that could be used effectively by the courts. As an illustration, in *Tierney* this process took just over a week, while similar factual determinations were not completed until roughly three months after the action was commenced.

Thus, in cases like *Cyber Promotions*, the court could look to opinions such as *Tierney* to help establish the underlying facts of the case and the proper posture from which to study the legal issues involved. Much of the Internet-related information and customs presented and reviewed by the magistrate in *Tierney* were similarly presented as stipulated facts by the parties in *Cyber Promotions*. By developing a body of opinions along the lines of *Tierney*, courts would then have a reliable, independent source of information to aid it in the dispute resolution process.

## CONCLUSION

The arbitration of commercial disputes has a long and rich history, resulting in the development of a number of effective mechanisms for resolving disagreements between parties. The recent evolution of the Internet as a common means of contact and communication provides a number of important tools which can significantly improve the efficiency and quality of alternative dispute resolution. The task at hand seems to be twofold: to develop the technology of the Internet in a way that will successfully enhance the rapid and effective resolution of commercial disputes, and, in turn, to determine the manner in which current national and international laws and policies must be altered to adapt them to the on-line world.